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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS LEONEL MCPHERSON, Defendant and Appellant.	E047957 (Super.Ct.No. RIF146205) OPINION

APPEAL from the Superior Court of Riverside County. B. J. Bjork, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Susanne C. Washington, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr., and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Thomas Leonel McPherson was convicted of misdemeanor domestic battery. (Pen. Code,[1] § 243, subd. (e)(1).) Immediately following the jury's verdict, the matter proceeded to sentencing. The court sentenced defendant to three years' summary probation on various terms and conditions, and imposed but suspended a jail sentence of 60 days. The court also indicated its intent to order defendant to reimburse the county for attorney fees in the amount of $2,500. However, when defendant indicated he could not pay the amount by December 1, 2010, the court ordered a complete financial evaluation and set a return hearing date of October 16, 2009. Defendant filed notice of appeal on March 19, 2009.

I. FACTS

On September 30, 2008, officers responding to a 911 call went to a residence in Moreno Valley. The officers learned that defendant and his fiancée had been arguing, and defendant had choked and slapped her, threw her on the ground, and kicked her. She had some swelling on her cheek and complained of pain to her legs, back and face.

II. DID THE TRIAL COURT CORRECTLY ORDER THE DEFENDANT TO REIMBURSE THE COUNTY FOR COSTS OF HIS DEFENSE?

Defendant contends the trial court erred when it ordered him to reimburse the county for the cost of his appointed attorney without giving him prior notice and without determining whether he had the ability to pay court-appointed counsel fees as required by section 987.8. He also claims the court had no jurisdiction to set an additional hearing

[1] All further statutory references are to the Penal Code unless otherwise indicated.

beyond August 27, 2009, six months after conclusion of the criminal proceedings. Finally, defendant challenges the sufficiency of the evidence to support the court's order.

A. Procedural Background

Defendant was convicted by the jury on February 27, 2009. That same day, the following discussion occurred:

"THE COURT: . . . This is now the time for sentencing. It is a misdemeanor. If we're not—I don't know—do you wish to have the matter referred, [defense counsel]?

"[DEFENSE COUNSEL]: We'd just as soon that this Court make the sentence today."

The court then sentenced defendant. During this time, the court heard from the victim, defendant's fiancée and the mother of his children. She did not want defendant to go to jail. She explained: "[Defendant] has been our sole provider as far as income and support of the family. You know, since this whole experience, . . . if anything happens to [defendant] where he can't work or can't provide for us—we've been suffering, you know. I take the risk of losing our home for our children. We've already lost our first home that we were residing in at the time of this situation. So you know, . . . I hate for my children to have to suffer anymore . . . ."

Regarding imposition of the public defender's fees, the following exchange occurred:

"THE COURT: And are you working at this time, Mr. McPherson?

"THE DEFENDANT: No.

"THE COURT: When you work, how much do you earn?

"THE DEFENDANT: Well, I don't know, because I can't find a job.

"THE COURT: How much do you usually earn?

"THE DEFENDANT: I used to make eight hundred to a thousand dollars a week.

"THE COURT: Okay. So let's see—we had a jury trial Monday, Tuesday, Wednesday, Thursday, and Friday. The Court's going to impose public defender fees of $2,500.00."

Defense counsel attempted to object to the imposition of such a high fee; however, the trial court explained that "public defenders don't have any input as to public defender fees. We impose the fees." It imposed the fee of $2,500 and inquired as to whether defendant could pay the amount in full on or before December 1, 2010. Defendant replied that he could not. The court then implicitly vacated its finding and ordered a complete financial evaluation with a return date of October 16, 2009, for a hearing to determine defendant's ability to reimburse the public defender's office. The court suggested the defendant go to the financial services office "about a month before you go back to court." It also stated that, if defendant did not go through the financial services evaluation, then on October 16, the court's recommendation that he pay $2,500 in public defender fees would become an order.

On July 9, 2009, defendant filed a financial statement and affidavit stating he was unemployed, had no income, and was homeless. However, regarding the hearing set for October 16, 2009, there is nothing in the record before this court to evidence that such hearing took place. On our own motion, we take judicial notice of the "Actions" in case No. RIF146205 from February 27, 2009, through November 1, 2009, using the Public

Access to Court Records Web site for the Superior Court of Riverside County, California <http://www.riverside.courts.ca.gov/pubacc.htm> (as of June 10, 2010). (Evid. Code, §§ 452, subds. (c), (d), 459.) A review of the case information for that time period shows no hearing was held. Thus, the only reference to the imposition of $2,500 in public defender fees is in the minutes of the February 27, 2009, hearing.[2] Given this discrepancy, we conclude that as of February 27, 2009, there was no order requiring defendant to pay $2,500 in public defender fees.

B. Applicable Law

An assessment of attorney fees against a criminal defendant involves the taking of property, triggering constitutional concerns. Due process, therefore, requires that the defendant be afforded notice and a hearing before such a taking occurs. (*People v. Amor* (1974) 12 Cal.3d 20, 29-30; *People v. Phillips* (1994) 25 Cal.App.4th 62, 72.) Section 987.8 sets forth the statutory procedure for ascertaining a criminal defendant's ability to

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[2] According to the minutes, the court found that "defendant has the ability to reimburse the county for attorney fees in the amount of $2500.00 payable to court through Financial Srvcs." The minutes further provide: "Court orders defendant to be evaluated by Financial Services re: Attorney Fees." However, these minutes contradict the court's oral pronouncement, which specifically stated: "[T]he public defender's office has a right to be reimbursed . . . . This is not a term and condition of probation. It is a fee that you have to pay. You go through the evaluation. If you don't have it, fine, we'll take it into consideration. If you do have it, we'll take it into consideration. If you don't go through the evaluation, on October 16th, it becomes an order, and if you don't pay it, we then can collect on you civilly, do you understand?"

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. [Citations.]" (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) "The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment. [Citation.]" (*Id.* at pp. 387-388.)

repay the county for the cost of services rendered by court-appointed counsel. It includes provisions for notice and a hearing to determine the defendant's present ability to pay such fees. (§ 987.8, subd. (b).)

"Subdivision (b) of section 987.8 . . . provides that, upon the conclusion of criminal proceedings in the trial court, the court may, *after giving the defendant notice and a hearing*, make a determination of his present ability to pay all or a portion of the cost of the legal assistance provided him." *(People v. Flores* (2003) 30 Cal.4th 1059, 1061 (*Flores*), fn. omitted, italics added.)

"'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her . . . ." (§ 987.8, subd. (g)(2).) "Subdivision (g)(2)(A), (B) of section 987.8 defines '"[a]bility to pay"' as including a defendant's 'reasonably discernible future financial position,' as well as his 'present financial position,' but stipulates that '[i]n no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position.'" (*Flores*, *supra*, 30 Cal.4th at p. 1063, fn. 2.)

C. Analysis

Initially, defendant contends the trial court failed to follow the statutory procedures when it ordered him to reimburse the county $2,500 for the cost of his defense. We agree and disagree. First, we note that, although the trial court initially ordered defendant to pay $2,500 on February 27, 2009, it changed its mind when defendant stated he could not pay such amount by December 2010. Thus, the trial court's

initial imposition of the public defender fee was improper because defendant was not provided with proper notice. However, the court set a hearing date of October 16, 2009, for the purpose of determining whether it should order defendant to pay $2,500 in public defender fees. By setting a hearing date of October 16, the court implicitly vacated its February 27 order imposing payment of $2,500 for the cost of defendant's defense.

Second, the purpose of the October 16, 2009, hearing was to receive evidence of defendant's ability to pay for the purpose of determining defendant's ability to pay. As such, the court ordered defendant to "go to the financial services office for a complete financial evaluation." Accordingly, defendant was provided notice and given a hearing date (October 16) prior to the court determining his ability to pay and making an order for such payment.

Next, defendant argues "the court had no authority to set an additional hearing for October 16, 2009." He points out that section 987.8, subdivision (b) provides that "any additional hearing must take place 'within six months of the conclusion of the criminal proceedings.'" Since the trial court pronounced sentence on defendant on February 27, 2009, he argues "any subsequent hearing was required to be held no later than August 27, 2009." We agree.

Section 987.8, subdivision (b) provides: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay

all or a portion of the cost thereof. *The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings.* The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Italics added.)

Here, because the trial court failed to set a hearing within six months of the date it orally pronounced sentence, it lost jurisdiction to do so. (*People v. Spurlock* (1980) 112 Cal.App.3d 323, 329.) Section 987.8 refers to a defendant's present ability to pay; thus, imposition of a six-month period for the ability-to-pay hearing is reasonable. If the trial court had held such hearing within the six-month period, and the case was before us because the court had erred in imposition of attorney fees, then we could remand to provide the trial court with an opportunity to correct its error. (*Flores*, *supra*, 30 Cal.4th at p. 1068.) However, that is not the case before this court.

Because we have found the trial court implicitly vacated its February 27, 2009, order imposing $2,500 in public defender fees, and that it failed to issue a new order within the statutory period of six months from the date it orally pronounced sentence, we conclude there is no order requiring defendant to pay $2,500 in public defender fees. Reference to the court's finding that defendant has the ability to reimburse the count for attorney fees in the amount of $2,500 in the minute order dated February 27, 2009, is incorrect. Because there was no ability-to-pay hearing, we need not consider defendant's final claim that the evidence is insufficient to support the court's order.

III. DISPOSITION

The Superior Court of Riverside County is instructed to correct the sentencing minute order dated February 27, 2009, to reflect that (1) the trial court's initial finding that defendant has the ability to reimburse the county for attorney fees in the amount of $2,500 was vacated, and (2) the court set an ability-to-pay hearing for October 16, 2009. The trial court is further instructed to correct the Fine Information on its website, and in any of its records, by deleting any reference to a legal counsel fee imposed in the amount of $2,500. Following modification of the sentencing minute order and other relevant documents, the trial court is ordered to transmit such appropriately amended documents to the all relevant authorities. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.